

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4  
5 UNITED STATES OF AMERICA

6  
7 vs.

8  
9 RYAN HARRIS

10  
11 \*\*\*\*\*

12  
13 For Hearing Before:  
14 Chief Judge Mark L. Wolf

15 Status Conference

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Tuesday, February 7, 2012

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5200, Boston, MA 02210  
bulldog@richromanow.com

A P P E A R A N C E S

ADAM J. BOOKBINDER, ESQ.

United States Attorney's Office  
John Joseph Moakley Federal Courthouse  
One Courthouse Way, Suite 9200  
Boston, Massachusetts 02210  
(617) 748-3112  
E-mail: Adam.bookbinder@usdoj.gov

and

MONA SEDKY, ESQ.

U.S. Department of Justice  
601 D. Street, N.W.  
Washington, D.C. 20530  
(202) 353-4304  
Email: Mona.sedky@usdoj.gov  
For the United States of America

CHARLES P. MCGINTY, ESQ.

Federal Public Defender Office  
District of Massachusetts  
51 Sleeper Street, 5th Floor  
Boston, Massachusetts 02210  
(617) 223-8080  
E-mail: Charles\_mcginty@fd.org  
For the defendant

1 P R O C E E D I N G S

2 (Begins, 11:00 a.m.)

3 THE CLERK: Criminal Matter 09-10243, the  
4 United States of America versus Ryan Harris. The Court  
5 is in session. You may be seated.

6 THE COURT: Good afternoon. Would counsel  
7 please identify themselves for the Court and for the  
8 record.

9 MR. BOOKBINDER: Good afternoon, your Honor.  
10 Adam Bookbinder and Mona Sedky for the United States.  
11 Your Honor, I would just like to point out that our two  
12 case agents are here as well, which may be something  
13 that we want to take up as a preliminary matter, whether  
14 it's proper for them to be here.

15 THE COURT: Okay. What are their names?

16 MR. BOOKBINDER: I'm sorry. Their names are  
17 Special Agent Timothy Russell, from the FBI, and Special  
18 Agent Jason Ryan from the IRS.

19 THE COURT: Okay.

20 MR. MCGINTY: And, your Honor, for Mr. Harris,  
21 who is here by phone connection, Charles McGinty for the  
22 Federal Defender's Office, and with me is Christine  
23 Demaso, who is a legal writing attorney with my office.

24 THE COURT: All right. Actually I realized  
25 that I hadn't issued a sequestration order which I will

1 do today. I think it's the government's request, if I  
2 understand it, that it be allowed to have two  
3 representatives in the courtroom, even if --

4 Are both of them potential witnesses?

5 MR. BOOKBINDER: They are, your Honor, yes.

6 THE COURT: Is there any objection to that?

7 MR. MCGINTY: There is, your Honor, and there  
8 is at this time. This is a hearing on evidentiary  
9 considerations. Um, it will presumably address  
10 admissibility, potentially also the basis for a contest  
11 of certain factual matters. I don't want that to inform  
12 their possible testimony.

13 THE COURT: Well, the government has an  
14 absolute right to pick one of them. And I'm delayed in  
15 coming in because of the failure to brief the motions in  
16 limine in a timely way has had just the effect I was  
17 concerned about. It set me back. I'm not going to  
18 spend much time on this right now. I'll get it resolved  
19 before trial.

20 But which one would you like to pick? One could  
21 stay and one can go.

22 MR. BOOKBINDER: Your Honor, I suppose then  
23 Special Agent Russell has been the case agent somewhat  
24 longer and I figure that he stay and Special Agent Ryan  
25 can have the morning off.

1           THE COURT: All right. Then his colleague is  
2 excused.

3           (Agent Ryan leaves courtroom.)

4           THE COURT: Here's the sequestration order  
5 that operates from this time forward, although it may  
6 need some discussion because I'm not sure it's my  
7 intention to exclude Mr. Russell from talking to  
8 Mr. Ryan about the case.

9           (Pause.)

10          MR. BOOKBINDER: Your Honor, that actually  
11 would be a helpful clarification to the extent that we  
12 prepare --

13          THE COURT: At this point I'm not excluding  
14 Mr. Russell from discussing the case with Mr. Ryan.

15          MR. BOOKBINDER: Thank you, your Honor.

16          THE COURT: And we'll come back to this.

17          MR. BOOKBINDER: Thank you, your Honor.

18          THE COURT: My suggestion is that we talk  
19 further about this.

20          The filings that I ordered on February 1st have  
21 been made, although perhaps not all the filings I  
22 ordered on December 14th. We'll get this. I've begun  
23 to work on those submissions. We'll spend about an hour  
24 and a half this morning, that's all I have, and resume  
25 tomorrow.

1           One motion that's come in since I saw you last  
2 week is the defendant's motion for travel and lodging.  
3 That's allowed. Mr. Harris will be lodged at the YMCA  
4 on Huntington Avenue and the marshals will arrange his  
5 travel. The chief pretrial services officer, Mr. Riley,  
6 is present. Basically what I just described is standard  
7 operating procedure.

8           But are there any questions about this that should  
9 be discussed with me now or would you like a chance,  
10 Mr. McGinty, to talk to Mr. Riley and let me know  
11 tomorrow if you have any questions?

12           MR. MCGINTY: Yes, your Honor. I would also  
13 like to talk to my client about it. So if we could  
14 discuss this tomorrow.

15           THE COURT: Talk to your client about it. But  
16 he'll enjoy the YMCA.

17           All right. So, Mr. Riley, um, Mr. Hohler will  
18 tell you when we're going to resume tomorrow and if you  
19 come back we'll take up any logistical issues at the  
20 outset.

21           MR. RILEY: Thank you, your Honor.

22           THE COURT: Then with regard to the  
23 implementation of the trial order, have the parties --  
24 have the parties discussed possible stipulations?

25           MR. BOOKBINDER: We have, your Honor, and

1 we've gone back and forth with drafts of stipulations,  
2 um, the most recent being, I think, over the weekend,  
3 and we're hopeful we'll have some stipulations. But,  
4 you know, it's been a process to try to work them out.  
5 And we're mindful of the Court's order that they were to  
6 be filed last week. We tried. We couldn't reach any  
7 agreement by then. But we're hopeful to get an  
8 agreement shortly.

9 THE COURT: Because I think one of the issues  
10 related to one of your FBI agents in Seattle who was  
11 going to authenticate something?

12 MR. BOOKBINDER: Yes.

13 THE COURT: All right. So, Mr. McGinty, are  
14 you discussing stipulations?

15 MR. MCGINTY: We are discussing it and  
16 frankly, your Honor, this is a case where there's good  
17 communication between and among the parties. So I think  
18 that a lot of these things can get either ironed out or  
19 respectfully disagreed about. But we are in the  
20 process, we've had a back and forth, we've had daily  
21 communications about the core issues. So there has  
22 been, I think, effective communication and both parties  
23 are trying to iron out the --

24 THE COURT: That's good, as we'll begin  
25 discussing soon, there are some challenging, you know,

1 issues that are well worth vigorously contesting. And  
2 it would be fortunate if our focus didn't get distracted  
3 from that by things that are not genuinely in dispute.  
4 But that's up to the parties. I'll keep asking.

5 And when there are stipulations, um, they'll need  
6 to be signed by Mr. Harris when he gets here as well as  
7 by counsel, that's the form that I require, and they'll  
8 be a question -- it comes out in different ways in  
9 different cases, as to whether the stipulations will  
10 just be read to the jury or entered into evidence. But  
11 when they are detailed matters -- and this is a matter  
12 in which I have discretion, I think, if there's a  
13 dispute, if it's detailed matters, um, I would simply  
14 enter them into evidence. Okay?

15 The government mentioned in its trial brief that  
16 it proposed to elicit expert testimony from two  
17 witnesses, I think Kohler and Brodfuehrer, is that  
18 right?

19 MR. BOOKBINDER: It is, your Honor. Yes.

20 THE COURT: Have you made the expert  
21 disclosures required by Rule 16? I'm not sure I gave  
22 you a deadline.

23 MR. BOOKBINDER: I don't know that there was a  
24 court deadline, but we did, your Honor.

25 THE COURT: Okay. And does the defendant



1 anticipate any expert testimony?

2 MR. MCGINTY: Um, not at this time, your  
3 Honor.

4 THE COURT: Since the government's disclosed  
5 its expert evidence, Rule 16, as I recall, imposes a  
6 reciprocal obligation on the defendant. So I'll give  
7 you until a week from today, the 14th of February, to  
8 make the -- to identify any expert or experts and give  
9 the government a written summary of the expert's  
10 testimony required by Rule 16(b)(1)(C).

11 Has the government produced all material  
12 exculpatory information?

13 MR. BOOKBINDER: I believe we have, your  
14 Honor.

15 THE COURT: That was due January 20th and it's  
16 a continuing obligation. I hope -- have you gone to all  
17 of the agencies that were involved in this investigation  
18 and sought such information, written or oral?

19 MR. BOOKBINDER: We have done that, your  
20 Honor, and we expect to continue producing discovery  
21 through trial.

22 THE COURT: And has the government described  
23 all of its proposed Rule 404(b) evidence?

24 MR. BOOKBINDER: We have, your Honor, and  
25 there are some situations, as I think we'll talk about

1 today, where it's not clear that things fall within the  
2 rule, but we've flagged them as a possibility.

3 THE COURT: Yeah, I think there will be issues  
4 -- are issues as to whether something is intrinsic or  
5 would have to be admitted under Rule 404(b) and I just  
6 want to try to make sure that the defendant knows about  
7 all of the evidence that you might reasonably argue  
8 should be analyzed under Rule 404(b) and 403 rather than  
9 as evidence intrinsic to the conspiracy.

10 I thought I had ordered this, but perhaps I  
11 didn't. I didn't see a single list of all of the  
12 people, like a pseudonym like "Mr. T," um, that the  
13 government is going to be asking me to make **Petrozziello**  
14 rulings on. Are you able to -- do you have such a list?

15 MR. BOOKBINDER: Your Honor, we apologize if  
16 you misunderstood there. We did not produce a list like  
17 that. They were all discussed in our memorandum in  
18 support of our motions in limine by excerpts that were  
19 seized.

20 THE COURT: So there's nobody other than the  
21 people mentioned in the motion in limine?

22 MR. BOOKBINDER: That's correct, your Honor,  
23 yes. We've gone through each of the excerpts in that  
24 motion and there aren't other witnesses -- well, not  
25 witnesses, I guess they would be declarants, outside of

1       that.

2               THE COURT: All right. So just so I can make  
3 note of it. Who are the people? You've got Harris,  
4 Phillips -- I'm sorry. You've got -- here, are you able  
5 to give me the names?

6               MR. BOOKBINDER: I'm sorry. Yes. So the  
7 names of the individuals. So obviously Mr. Harris,  
8 Mr. Phillips, and Ms. Lindquist as the, um, insiders.  
9 Then Mr. Hanshaw -- I don't think I have any statements  
10 of his that were seized and introduced for that  
11 purpose. Your Honor, if I could just refer to our  
12 filing to answer.

13               (Pause.)

14               MR. BOOKBINDER: So then, um, there's the  
15 person going by the name of "Mr. T." A person using the  
16 name of "Moore," M-O-O-R-E, Capital R. And the -- well,  
17 we discuss a person going by the name "X-factor," but  
18 we're not offering that statement as a co-conspirator  
19 statement.

20               THE COURT: Well, you'd better make a list of  
21 this anyway because --

22               MR. BOOKBINDER: Well, that's fine. We can  
23 include him. So the first one there would be  
24 "X-factor." And then, um, there are posts by a series  
25 of other individuals and those people, their user names,

1 are the following. There is someone who uses the name  
2 "LV Neptune." There's someone using the name "Joe  
3 Tecno." The next one is "Live it up 278." And there is  
4 one that we refer to in our brief that turns out not to  
5 be a customer, and so therefore we're not going to  
6 suggest that he's a co-conspirator. It's the next one.  
7 Don't add him to the list. And the final one is someone  
8 using the name of "Bored," B-O-R-E-D, Number "7," and  
9 word "One," O-N-E, and the number "4." So it's "Bored  
10 7One4." And I believe -- oh, I'm sorry. There's one  
11 that I missed. Ms. Sedky points to me. Someone using  
12 the name "DJ," letter D, letter J, "212."

13 THE COURT: All right. And there's somebody  
14 mentioned in the trial memo who you do not contend is a  
15 co-conspirator. Who is that?

16 MR. BOOKBINDER: Oh, I'm sorry, the one that  
17 we do not contend is a co-conspirator is one that is --  
18 uses the name "P. McGrath," M-c-G-R-A-T-H.

19 And, your Honor, if I could consult with counsel  
20 to see if I'm missing any.

21 (Pause.)

22 MR. BOOKBINDER: Let me just make sure, your  
23 Honor, I didn't skip one.

24 (Pause.)

25 MR. BOOKBINDER: I think that's it, your

1 Honor.

2 THE COURT: Well, if there are any others,  
3 you'll let us know tomorrow.

4 MR. BOOKBINDER: I apologize. There are two  
5 more that we got through the course of our discussion of  
6 the posts and I didn't include them. Let me give those  
7 to you. They are both customers. The user names are  
8 "Sean," S-E-A-N, "19661." And the next one is someone  
9 who goes by the name "Aspeer," A-S-P-E-E-R.

10 THE COURT: Okay. I'm ordering that, ideally  
11 by tomorrow, but if you need more time, I can give it to  
12 you, but just give me a submission that says "These are  
13 the people as to whom the government will be requesting  
14 **Petrozziello** rulings," because my clerks and I will have  
15 to keep track of the evidence with regard to each of  
16 them, so I can decide, at the conclusion of all of the  
17 evidence, whether it's proven by a preponderance that  
18 the individual by that name or with that identifier is a  
19 member of the conspiracy and that the statement that  
20 would be admissible under Rule 801(d)(2)(E) were made in  
21 furtherance of a conspiracy.

22 All right. Procedurally, with regard to the  
23 trial, um, I'm going to order the parties to let their  
24 adversaries and the Court know, several days in advance,  
25 the order of the expected witnesses and what exhibits

1 that you each hope to introduce in your cases in chief  
2 through those witnesses, and then I'm going to want to  
3 know if there are objections to those exhibits. So  
4 basically we're going to begin discussing these issues,  
5 and other issues, this morning, but, um, even if I rule  
6 in limine, I have to rule again at trial and I'm going  
7 to want to be able to prepare for each day and minimize  
8 the risk that we'll need sidebars or lengthy sidebars  
9 while the jury is sitting there. Okay?

10 So why don't we say, by the 14th, that the  
11 government provide to the defendant and the Court, you  
12 know, the witnesses it expects to present during the  
13 first three days of testimony and the exhibits  
14 associated with each. And by the 16th, I want to -- the  
15 defendant to inform me, and the government, of which of  
16 those exhibits are objected to and on what basis -- and  
17 it can be a shorthand, "hearsay," "not a co-conspirator  
18 statement," "contrary to the government's contention, it  
19 is being offered for the truth," comparable to what's in  
20 the opposition to the motions in limine. Just  
21 sufficient enough so it will remind me.

22 MR. BOOKBINDER: Your Honor, if I could ask a  
23 question that relates to that a little. Um, what it  
24 would be helpful for us to know is whether the Court  
25 would like us to have a witness here for the first day

1 of trial?

2 THE COURT: I'm going to go through that, but  
3 no. I'm going to explain the jury selection process to  
4 you at some point. I expect the first morning, at  
5 least, will be subsumed with selecting the jury and then  
6 the next day you'll make your openings and then call  
7 your first witness.

8 MR. BOOKBINDER: Okay, that's helpful, your  
9 Honor. Thank you.

10 THE COURT: All right.

11 Did the defendant produce his exhibits? They were  
12 due February 2d.

13 MR. MCGINTY: Your Honor, at the moment, um,  
14 we have not produced any -- we're not presenting any at  
15 the moment.

16 THE COURT: You have no exhibits that you plan  
17 to introduce in your case in chief?

18 MR. MCGINTY: That may be subject to change,  
19 your Honor, but as of now, no.

20 THE COURT: As of now you have none?

21 MR. MCGINTY: Correct.

22 THE COURT: Well, as soon as you get one, you  
23 have to produce it forthwith.

24 (Pause.)

25 THE COURT: I will explain the jury selection

1 process to you tomorrow.

2 Do you have a sense of how long you might want for  
3 your openings?

4 MR. BOOKBINDER: Your Honor, not more than  
5 about 40 minutes, I would think.

6 THE COURT: Does the defendant expect to make  
7 an opening?

8 MR. MCGINTY: Yes, and I think the same, your  
9 Honor.

10 THE COURT: All right. You can each have up  
11 to 40 minutes.

12 And does the government intend to use any chalks  
13 or summaries or exhibits in its opening?

14 MS. SEDKY: At this point we do, your Honor.  
15 We intend to, um -- we haven't put them together, but we  
16 intend to take some select quotations from Mr. Harris  
17 and put them on a board and possibly also have a visual  
18 aid that our expert will also --

19 THE COURT: Fine. You have to show those --  
20 basically I don't permit anything to be shown to the  
21 jury, except on cross-examination, that hasn't been  
22 shown to your adversaries so I can see if there's an  
23 objection.

24 So would there be a problem with developing those  
25 within the next week, showing them to Mr. McGinty, and



1 then you can let me know on February -- so you'll do  
2 that on February 14 and on February 16 I'll see if the  
3 defendant has any objection. Okay?

4 MS. SEDKY: Thank you, your Honor.

5 THE COURT: In the last couple cases I've  
6 tried, um, there have been disputes about the  
7 admissibility of summaries, basically that the summaries  
8 need to be, under Rule 1006, summaries of voluminous  
9 writings, essentially things that are documented,  
10 without any evidence, any testimony that -- you know,  
11 it's got to summarize what's in the documents and if  
12 it's going to be admitted as a summary that will go to  
13 the jury as an exhibit under Rule 1006, it can't include  
14 any of the evidence. Um, if it's going to have  
15 something more than that, it's potentially usable as a  
16 chalk that's not admitted, a device that's permitted  
17 under Rule 611.

18 So you should keep that distinction in mind and  
19 you might want to look at something like **United States**  
20 **vs. Milkowicz**, 470 F.3d 390 at 398. **MacElroy**, 587 F.3d  
21 73. These are First Circuit cases. But basically I  
22 think **Milkowicz** is probably the best discussion.

23 All right. I've read the trial briefs and they  
24 are, as I expected, helpful.

25 (Pause.)

1           THE COURT: I think -- and after the jury is  
2 sworn, probably on the second day of trial, which would  
3 be a Wednesday -- and I'll give them some preliminary  
4 instructions on the black letter law as it applies to  
5 this case and I'll review that with you, but in reading  
6 the trial briefs there were a couple of issues in cases  
7 that struck me as particularly important to this case  
8 that it might be useful to talk about a little now.

9           One of the issues that both the defendant and I  
10 have focused on is whether the government, in this case,  
11 has alleged and is going to be able to prove a single  
12 conspiracy, rather, with Mr. Harris at the hub, with a  
13 number of spokes, but also a rim, to use the customary  
14 analogy, or whether this case involves at most multiple  
15 conspiracies? And of course the government would be  
16 required -- I'll instruct the jury that the government's  
17 required to prove the conspiracy charged in the  
18 indictment and not some other conspiracy existed.

19           I thought that among the cases on this issue cited  
20 in the trial briefs that were particularly valuable were  
21 **Blumenthal**, a Supreme Court decision, **Surreff**, which I  
22 think is a Second Circuit case, and particularly  
23 **Portella**, 167 F.3d 687 at 695 to 696, a 1999 First  
24 Circuit case. Also **Fenton**, 367 F.3d 14, a First Circuit  
25 case that talked about nefarious in the conspiracy

1 context. But I found **Portella** particularly important or  
2 valuable because the First Circuit wrote: "That to  
3 determine if the evidence supports a single conspiracy,  
4 that is to say, a single general agreement, courts have  
5 looked for, one, common goal, two, interdependence among  
6 the participants, and, three, overlap among the  
7 participants."

8 In this case my sense is that that interdependent  
9 prong is especially important for our focus and the  
10 First Circuit said on that: "To establish an  
11 interdependence among participants requires determining  
12 whether the activities of one aspect of the scheme are  
13 necessary or advantageous for the success of another  
14 aspect of the scheme. Each individual must think the  
15 aspect of the venture interdependent on each defendant's  
16 state of mind and not as mere participation in some  
17 branch of the venture as key. No interdependence makes  
18 it reasonable to speak of a tacit understanding between  
19 the" -- it's a drug case, I guess, "distributor and  
20 others upon whose unlawful acts the distributor knows  
21 his own success likely depends." Put another way:  
22 "Evidence of an individual participant's understanding  
23 of the interdependence of the co-conspirator's  
24 activities is evidence, often the best evidence of a  
25 tacit agreement between the individual and his

1 co-conspirators."

2 But I think that interdependence, in my present  
3 conception, is important to proving the rim of the  
4 alleged conspiracy, or that of the purchasers of  
5 Mr. Harris's devices for conspiring with each other as  
6 well as with him. And then I think I understand better  
7 than I did previously that the government contends that  
8 the people who purchase Mr. Harris's products didn't  
9 have everything they needed, they needed to get MAC  
10 addresses typically from other purchasers.

11 But anyway I think it would be helpful, before we  
12 get to the particulars of the evidentiary disputes, for  
13 me to go over some of these fundamental principles and  
14 to see whether you think I focused on the right cases  
15 and have stated the standards correctly.

16 But what does the government have to say about  
17 this?

18 MS. SEDKY: Thank you, your Honor.

19 It's correct that the government's position is we  
20 charged this as a single hub-and-spokes conspiracy with  
21 Mr. Harris at the hub and the spokes are the users all  
22 over the country including the four that we've named in  
23 our indictment. And the way that -- this is a -- well,  
24 Mr. Harris's operation cannot function alone. A single  
25 user really can't sit alone in Boston, with no other

1 user, and successfully steal internet service using  
2 Mr. Harris's help because functionally the way many ISPs  
3 -- and we'll have our expert testify about this at  
4 trial, but the way many ISPs work is, um, to the extent  
5 that Harris helped his customers steal or sniff MAC  
6 addresses, that was to a specific node -- and that's a  
7 technical cable term. You can sniff on your node or at  
8 most you can sniff on what's called your Cable Modem  
9 Termination System, your CMTS. And cable companies are  
10 set up so that if I have a MAC address on one node or  
11 one CMTS and I'm a legitimate paying subscriber, then  
12 Mr. Bookbinder can't clone my MAC address and try to use  
13 that if he is also on my own CMTS or my own node. We've  
14 been using the "neighborhood" loosely to describe the  
15 CMTS or a node and different ISPs operate in different  
16 ways.

17 But it's very -- it's a common problem that you  
18 can't sniff your neighbor's MAC address and use it to  
19 steal because what will happen is somebody's going to  
20 get bumped off or both people will get bumped off  
21 because technologically the packets don't know where to  
22 go when they have two MAC addresses popping up at the  
23 same time. And so it's --

24 THE COURT: At the same time or at the same  
25 time in the same neighborhood?

1 MS. SEDKY: At the same time in the same  
2 neighborhood on the same node, it will not --

3 THE COURT: So is a node geographic?

4 MS. SEDKY: Yes, a node is geographic and it's  
5 also load focused. So if you have a very dense  
6 population, you'll have fewer nodes on a CMTS, for  
7 example. So basically nodes -- houses feed to nodes,  
8 nodes feed to a CMTS. And just depending on whether  
9 we're talking about apartment buildings or single-family  
10 dwellings, the geographic area could be smaller or  
11 larger, depending on how dense the population is.

12 THE COURT: But is it true that if there were  
13 a MAC address in Boston, say, or a neighborhood in  
14 Boston, nobody in that neighborhood in Boston could use  
15 the same MAC address, but somebody in Los Angeles  
16 could?

17 MS. SEDKY: That's correct, for many, many  
18 ISPs at the time that Mr. Harris's products were in  
19 operation. And so most of these people knew that. Most  
20 people knew that if they used the CoaxThief, the packet  
21 sniffer, they would get something that was probably not  
22 going to be helpful to them, but would be helpful to  
23 somebody else who was doing the same thing.

24 THE COURT: It wouldn't be helpful to them  
25 because they're getting other MAC addresses in their own

1 neighborhood and they would have to, if they were in  
2 Boston, find somebody in Los Angeles --

3 MS. SEDKY: Exactly. Exactly. And so  
4 Mr. Harris knew this. This was essentially a technical  
5 issue that he had to face and that his users had to face  
6 and so that he knew that he had to facilitate their  
7 exchange of stolen MAC addresses cross-country, cross-  
8 neighborhood, basically cross-CMTS.

9 So, um, I mean, I guess ostensibly you could take  
10 his product and you could drive across town and plug it  
11 in there and sniff over there and then drive back to  
12 your home and use the stolen MAC address. And, you  
13 know, there would be one-off instances where if that's  
14 what you wanted to do you could. But what happened was,  
15 um, there was a very robust black market essentially for  
16 stolen MAC addresses to be traded very freely and openly  
17 on his website.

18 THE COURT: And so it's your theory, your  
19 contention that this interdependence prong of a single  
20 conspiracy would be satisfied by the fact that the  
21 purchasers of Mr. Harris's products knew that there were  
22 many other purchasers and only if they cooperated, or  
23 cooperated, I suppose, with people who got similar  
24 products from somebody else, um, would it be of any  
25 value to them? Is that the theory? Or how are you

1 going to prove the interdependence?

2 MS. SEDKY: Well, we have four or five  
3 different factors that we think show the  
4 interconnectedness. One is just the sheer functionality  
5 of the need to obtain MAC addresses either by swapping  
6 to get MAC addresses from another node or there are  
7 people who just -- they don't know how to use the MAC  
8 sniffer, they don't want to deal with MAC sniffing, so  
9 they just -- they need to go get a MAC address, and so  
10 they go to his website to get MAC addresses and it just  
11 so happens that the MAC addresses are, by and large,  
12 being posted by other users.

13 So one is the trading of the MAC addresses, that  
14 was one interconnectivity function. The other was they  
15 relied on each other for reconnaissance because some of  
16 the ISPs, as we've mentioned in our briefs before, this  
17 was a very, very fluid, um, marketplace where the ISPs  
18 were constantly trying to add security measures to knock  
19 Harris's users off their networks and so there was a lot  
20 of exchange of information and data about "Roadrunner is  
21 blocking Nicknacks," and we'll have some people testify  
22 about what a "Nicknack" is, and how, "someone has  
23 instituted some kind of other security measure."

24 And so there's a lot of information flow that --  
25 it was almost like they had a help desk for one another,



1     that they were exchanging information about their  
2     successes and failures about their particular ISPs in  
3     their geographic areas. So in addition to exchanging  
4     MAC addresses, they also exchanged information about  
5     product success and failure which Harris himself then  
6     used to tweak his products.

7             And so in addition to, I think we called it the  
8     "bartering platform for the MAC addresses," they also  
9     had what was essentially a user feedback forum, which  
10    was very important for the success of the product  
11    because it was a product that kept evolving. They  
12    issued updates constantly to try to continue this game  
13    of cat and mouse with the ISPs. And that was his only  
14    source of -- and that was a primary source of  
15    information was finding out what the heck was going out  
16    on the field. So, Number 2, was sort of, um, a user  
17    feedback form.

18            And Number 3 was just help desk functionality  
19    where a lot of them you'll see are troubleshooting for  
20    one another. And so that was a very interconnected --  
21    way to the interconnected. Someone will say, "I can't  
22    get on this," "Well, try this. Try that." And so those  
23    things fed into the product evolution and the product  
24    tweaking.

25            And so there was this whole sort of agrarian

1 system or microcosm or mini world of people all needing  
2 information and MAC addresses and also configuration  
3 files. We haven't been talking about configuration  
4 files, but they were trading configuration files just  
5 the way they were trading MAC addressing

6 THE COURT: What's a configuration file?

7 MS. SEDKY: A configuration file comes into  
8 play for the uncapping piece. There were two types of  
9 theft of service here. Mr. Harris was helping two  
10 different kinds of computer users steal service. He was  
11 helping people who were not subscribers at all do  
12 outright theft of service. So they needed a MAC address  
13 because they weren't legitimately on anybody's network,  
14 so they weren't subscribers. He also helped people who  
15 were bare bones subscribers of the cheapest, slowest  
16 service uncap. And these are not mutually exclusive.  
17 But the way that you uncap is you essentially get much  
18 faster and much more expensive speeds and you don't pay  
19 the premiums.

20 And so for the uncappers, some of those uncappers  
21 were subscribers and some of them were not subscribers,  
22 but either way they needed a configuration file and the  
23 configuration file is the file that the ISP sends out to  
24 the modem that has the key settings for that modem in  
25 it. So the modem is told, "This is the speed of what

1     you paid for." So if I'm a subscriber and I turn on my  
2     modem, I shoot out my MAC address to my ISP, my ISP says  
3     "Oh, I recognize Mona Sedky, she pays for high, medium  
4     or low service, here is her configuration file," and  
5     they send it back to me, the configuration file, and  
6     then my modem will see how many megabits per second or  
7     kilobits per second is in that configuration file, which  
8     tells me how fast my service is going to be.

9             THE COURT: Okay. I think that gives me what  
10     I was looking for.

11             So the government -- am I correct from the  
12     government's perspective that, you know, **Portella** is one  
13     case that succinctly states the requirements for  
14     establishing a single conspiracy rather than multiple  
15     conspiracies?

16             MS. SEDKY: Yes.

17             THE COURT: And what's the defendant's view on  
18     this?

19             MR. MCGINTY: Well, I agree with the Court in  
20     terms of the characterization of the cases, but I think  
21     the Court neglected to mention one case that's sort of  
22     singularly important --

23             THE COURT: This is what I would like you to  
24     do.

25             MR. MCGINTY: -- because it really is the

1     template for, um, what has happened in the case and what  
2     is going to happen in the case and that's **Pappathanase**.  
3     So let me back up and try to provide the context for  
4     that to show how the Court's -- the Court's outline for  
5     how things came to pass in **Pappathanase** or exactly the  
6     track record --

7             THE COURT: And actually -- here, I'll say  
8     this so you can address it, and you can probably  
9     continue to think about it, but since I saw you the last  
10    time, I've read **Pappathanase** and I've read **Goldberg** and  
11    both of those cases were schemes to defraud, you know,  
12    to interfere with the functions of the Internal Revenue  
13    Service and -- and I thought that Judge Boudine in  
14    **Goldberg** was suggesting that you needed a particular  
15    specificity with regard to intent in such a case because  
16    virtually any crime done for financial gain has, as an  
17    incidental effect, hiding revenue from the Internal  
18    Revenue Service. And I think he talked about bank  
19    robbers. If you rob a bank, you're not going to record  
20    the proceeds on your tax form. But it doesn't mean that  
21    it was a scheme to defraud -- a conspiracy to defraud  
22    the IRS.

23            So it caused me to -- and then I'm going to talk  
24    to you, after we discuss this, about **Direct Sales**, which  
25    I think you both properly bring to my attention, but you

1 may not have a common sense of the implications of it  
2 because I think that also -- that **Direct Sales** is  
3 important for the sort of **Pappathanase, Goldberg** point I  
4 was raising. But go ahead.

5 MR. MCGINTY: The very important, um, degree  
6 in **Pappathanase** that sort of sets the table here is in  
7 that case, you know, the obvious concern was the  
8 **Goldberg** concern, which was whether, um, the tax  
9 consequence was integral or was just a consequence of,  
10 you know, a scheme that was intended for a different  
11 purpose. And the Court pointed out that what the  
12 government had done in that case is charge that it could  
13 have the tax effect pointing out that structural flaw  
14 the government thought it could cure it by using the  
15 word "would," and as the Court pointed out, that then  
16 gave -- that then explains of how the -- about how the  
17 case then proceeded after that into turmoil because the  
18 expectation that could would suffice emboldened the  
19 government to charge the rim of the conspiracy, the  
20 larger conspiracy, which failed, and once it failed,  
21 then the individual counts for which all the evidence  
22 had been brought in, in turn failed, and the whole thing  
23 unravels.

24 What's interesting about this indictment is what  
25 the government alleges. This is not what the

1 government's conception of the wrong here is, but what  
2 they charged as the wrong. In the indictment they use  
3 the word "enabled." "Enabled" sounds an awful lot like  
4 the "could," and the "enabled" is found in the  
5 indictment --

6 THE COURT: Under the manner and means.

7 MR. MCGINTY: -- under the manner and means  
8 and what it describes as the, um -- the -- how these  
9 things which the government says had the inherent  
10 capability of doing something, describes how these  
11 things "enabled" conduct by third parties. So it could  
12 have the effect -- and among the things it describes in  
13 manner and means in Paragraphs 16, 17, 18, um, and also  
14 in 22, it's describing how the capability of these  
15 products could have a number of effects among them, they  
16 enable the computer users to obtain internet service  
17 without making the required payment, they enable users  
18 to obtain faster upgraded or uncapped internet service  
19 without paying the premiums charged by the ISP, they  
20 enable users to use without authorization configuration  
21 files that the ISP would otherwise only provide to the  
22 legitimate subscriber paying for premium access.

23 THE COURT: And, I mean, I can move this and  
24 this may take us right into **Direct Sales**, but as a  
25 general statement with regard to black letter law, do

1       you agree that **Portella** sets out the standards?

2               MR. MCGINTY:   I do.

3               THE COURT:   That's one.   And then this does go  
4       into **Direct Sales** and this is jumping ahead probably  
5       more to my final instructions than my preliminary  
6       instructions.   But as in **DiMasi**, which I gave you, um,  
7       it's my present intention, when I finally instruct, to  
8       say "The government has to prove A, B, C and D, and it  
9       would not be sufficient to prove only something else,  
10      including, at this point, enabling."   But I think **Direct**  
11     **Sales** teaches me, particularly beginning on Page 209 --  
12     and let's see, that mere knowledge that a product will  
13     be used illegally is not sufficient to prove the  
14     defendant's a member of the conspiracy.   So it follows  
15     that it wouldn't be sufficient to just show it could  
16     be.   But this is why I think **Direct Sales** is an  
17     important case for the government as well as for the  
18     defendant.

19              I understand **Direct Sales** to mean that if a  
20     product is inherently susceptible to an illegal use, um,  
21     knowledge that it will be used illegally is relevant to  
22     proving that the defendant knew the buyer intended to  
23     use it illegally and intended to cooperate in that  
24     crime, which the Supreme Court says, plus an overt act,  
25     is the essence of a conspiracy.   And I think that, you

1 know, in **Direct Sales**, if I remember it right, it was  
2 morphine, **Falcone** was sugar. And, you know, to say  
3 that -- that it indicates to me, you know, that it's the  
4 government that has essentially undertaken to prove,  
5 that it says it's going to show that Mr. Harris's  
6 products didn't have legitimate uses, and certainly --  
7 well, let me just finish this.

8 MR. MCGINTY: Sorry.

9 THE COURT: -- and therefore, you know, it's  
10 been designed for illegal use, and you know from certain  
11 evidence that they propose to introduce that some people  
12 are using it illegally, and therefore this is some  
13 evidence that Mr. Harris intended to agree with the  
14 purchasers and intended that wire fraud be committed.  
15 That's sort of the framework in my mind at the moment.

16 MR. MCGINTY: Right. And the challenge for  
17 the government, I think, in proposing the instructions  
18 is that it sort of tees up what the standards would be  
19 for the plus factor that **Direct Sales** plays out because  
20 in **Direct Sales** it isn't just that the items were  
21 restricted items, and they were, it was morphine, it  
22 wasn't just that it was sold in lot quantities that were  
23 staggering to an individual doctor who couldn't  
24 conceivably have used it, it wasn't just that the  
25 predecessor to the DEA contacted the doctor and said,



1 "What are you doing?" basically saying, "Look, if you  
2 keep doing this, bad things are going to happen," but it  
3 was that the doctor continued to do it after that  
4 point. So there's a constellation of plus factors that  
5 makes **Direct Sales** of a kind and explains why after  
6 **Direct Sales** there has been, um, virtually no cases that  
7 have addressed the consequence of the sale of an item in  
8 terms of how it's used by an end user.

9 So in **Direct Sales** the Supreme Court said that  
10 when it reaches the point where it's in the face of the  
11 person that their continued conduct here is culpable  
12 conduct, um, we will permit the conviction, otherwise  
13 **Falcone** governs, and what **Falcone** says is that that  
14 knowledge, unless it's activated by a causal  
15 relationship where you're a part of the transaction, a  
16 part of what they're doing, that mere knowledge they're  
17 doing it is not sufficient for proof.

18 And if I could just back off a second, because the  
19 government talked about what these modems are, and I  
20 think just for background, the government in Exhibit 3,  
21 um, puts in the face pages, as I understand it, of the,  
22 um, website Mr. Harris had, and on that face page it  
23 demonstrates that among the things that Mr. Harris sold  
24 were a number of modems which were conventional modems,  
25 um, they were -- I'm referring now to Exhibit --

1 THE COURT: Is this 3?

2 MR. MCGINTY: Um, at 209, the government has  
3 paged these, which is rather helpful.

4 THE COURT: Are you sure it's 3, because if  
5 you look at the pages I have, it's numbered 3 at the  
6 bottom.

7 MR. MCGINTY: I'm sorry. It's Exhibit 2.

8 THE COURT: Oh, it's 2.

9 MR. MCGINTY: So it's at Page 0208 at the top  
10 right.

11 The first item there, a Motorola SB-5101 cable  
12 modem. It's a stock modem. It's not a modified modem.

13 THE COURT: 08? Okay.

14 MR. MCGINTY: Okay? There are other modems  
15 that are sold on the second page, on 0209, the SB-5100  
16 is a regular modem, it is unmodified. In other words,  
17 among the things that were sold by Harris included  
18 modems that were stock modems available for connection  
19 to the internet.

20 Each of the modems that Mr. Harris sold that were  
21 modified, each permitted access to the modem, and  
22 there's no significant price differential between the  
23 ones that were modified and the ones that weren't  
24 modified and what it would cost me if I went to Radio  
25 Shack and bought a modem to connect to the internet.

1           Now, the government, in its charge, talks about  
2       what the modified modems enable and what they say the  
3       modified modems enable is they enable theft of service,  
4       they enable --

5           THE COURT:   They enable what?

6           MR. MCGINTY:   They enable theft of service,  
7       they enable increased service, and the increased service  
8       that can be obtained would include a person who is given  
9       by the ISP a crimping of their speed.   They can download  
10      a config file, a configuration file that governs their  
11      speed, with no misrepresentation of the ISP, and obtain  
12      the thing that the ISP promised to give in terms of the  
13      service that they were promising to the customer, and  
14      that would be within the boundary of the payment that  
15      one makes as a customer for the service.   Imagine a  
16      person going to the fruit shop and buying a pound of  
17      bananas and seeing that the scale registers a pound and  
18      a half when the person's, in fact, getting less than  
19      that.   And what happens here is that Harris makes  
20      possible the, um, the deconstruction of a modem that  
21      creates the potential that a customer can do a number of  
22      different things, but among them change their config  
23      file to get the speed that they otherwise expect from  
24      the ISP in which the ISP is not providing.

25          THE COURT:   You mean that they paid for?

1           MR. MCGINTY: Which they paid for. A  
2 legitimate customer can use a modified modem to get the  
3 service promised. What he can also do with the modem is  
4 he can get, um, basically rechannel ways to receive, um,  
5 Internet content that has been, um -- that has been  
6 constrained or eliminated by the ISP.

7           So ISPs have remarkable control over my cable  
8 modem in my house and they disfavor, um, certain kinds  
9 of uploads. Um, they disfavor uploads from companies  
10 which they suspect might be involved in copyright  
11 infringement and they prevent me from getting access, or  
12 they limit my access, or they delay my access, or they  
13 restrain my access to person-to-person content, where I  
14 upload content, because they don't think that --

15           (Notification that conference call is  
16 disconnected.)

17           MR. MCGINTY: He will call back in. That's  
18 his instruction.

19           But they -- where the ISP is of the view that  
20 because that content may involve copyright violations,  
21 they will prevent it.

22           So the potential you get, by getting a modem, is  
23 that you get a reverse-engineered modem that permits you  
24 control in a way that the relationship with the ISP  
25 deprives you of.

1 THE COURT: So let me just --

2 MR. MCGINTY: Just one more thing to that,  
3 your Honor?

4 THE COURT: All right.

5 MR. MCGINTY: And in their charge, when they  
6 talk about what's enabled, they say that it's theft of  
7 service, they say there's increased speed. In their  
8 indictment they also say it permits anonymity, that it  
9 permits someone to have anonymity on the net. I can be  
10 a paying customer and I can achieve anonymity on the net  
11 by using a modem that deceives the ISP, yes, but is that  
12 fraud on the ISP for purposes of the wire fraud  
13 statute? I think the answer to that is "No." And the  
14 reason I may do that is I may be interested in anonymity  
15 because of my political communications and so forth --

16 THE COURT: But that's taken care of by, I  
17 think, by the intent to defraud requirement. In other  
18 words, anonymity -- there are lots of things that in  
19 some context might be lawful and in another context --

20 (Notification that conference call is  
21 reconnected.)

22 MR. MCGINTY: So if I might just finish up? I  
23 think this is important.

24 THE COURT: Okay.

25 MR. MCGINTY: So they're alleging multiple

1 uses that are part of a conspiracy and they are alleging  
2 among those multiple possible uses ones that are not  
3 illegal or ones that are not sufficient to implicate the  
4 wire fraud statute.

5 Jump to **Pappathanase**. In **Pappathanase** the  
6 question was, that the Court asked, was whether certain  
7 -- whether the conduct of the parties in having this  
8 payback system from the creamery, whether there were  
9 other reasons for it. Well, the other reasons are in  
10 the indictment here and in that case the Court said it  
11 was sufficient that one of the reasons might be float  
12 for -- and I mean no -- it's a modest benefit of a  
13 kickback program that a person may be able to get a  
14 couple hundred bucks and hold that without -- you know,  
15 for the benefit of future purposes. But if float is  
16 sufficient to float **Pappathanase**, um, the ability to get  
17 anonymity, um, the ability to contest the constraints  
18 that the ISP puts on my modem, on the things that  
19 otherwise I have access to and ought to be free content,  
20 certainly satisfies the standard that's in **Pappathanase**.

21 So under the circumstances here, um, the  
22 government charges a conspiracy and the conspiracy they  
23 say is all the things that Harris does. In their  
24 indictment is the core problem which is among the things  
25 it is alleged to do are things that are entirely outside

1 of the wire fraud statute. It then says to prove the  
2 hub what we're going to do is we're going to put in  
3 comments by other parties on a, um -- on a, um -- a  
4 forum that is part of the website, all of whom involve  
5 participants and outsiders who are posting their own  
6 thoughts, who are sharing their own views and their own  
7 information, where Harris has a statutory, um,  
8 protection against being responsible for the content.

9 THE COURT: Yeah, and I was going to get to  
10 that later, the Section 230, I think?

11 MR. MCGINTY: Yes.

12 THE COURT: In that universal decision that  
13 Judge Keeton wrote. That's statutory protection against  
14 state law tort liability, it's not statutory protection  
15 against -- in federal criminal prosecutions.

16 MR. MCGINTY: No, but it is notice that if  
17 you're the moderator of a website, you don't have a  
18 responsibility for cleaning out a forum. And it  
19 basically says that posters to a forum have the First  
20 Amendment right to communicate and that is respected by  
21 limiting the moderator's obligation for what is on  
22 there. And frankly, your Honor --

23 THE COURT: This is good. This is one of the  
24 points I was going to get to with you.

25 But let me hear from them about **Direct Sales**.

1       What's the government's --

2                   MS. SEDKY: Your Honor, we agree with the  
3       Court's assessment of what **Direct Sales** says, which is  
4       that, um, if you have a product, which we plan to prove  
5       in this case we do, that is inherently susceptible to an  
6       illegal or harmful use, the fact that they slapped the  
7       label "restricted item" in that case is not some  
8       talismanic omen that every object has to fit within. We  
9       fit within the notion that this is a product that is  
10      inherently susceptible to stealing free and faster  
11      internet and that that is a direct piece of evidence to  
12      show Mr. Harris knew how his products were going to be  
13      used and from his knowledge you can then infer in part  
14      his intent that people used his products the way that he  
15      knew that they would.

16                  THE COURT: Well -- and there are two types of  
17      intent the government always has to prove to prove a  
18      conspiracy, intent to agree and intent that the object  
19      of the agreement of that crime be committed.

20                  So what if anything, in addition to proving that  
21      Mr. Harris knew that his products could and would be  
22      used illegally, needs to be shown?

23                  MS. SEDKY: Well -- and when we talk about  
24      "could" versus "would," before I forget, I do want to  
25      just make one minor point. In our indictment we use the



1 word "enable" as equivalent to help. When you're an  
2 enabler in the psychotherapy context, you're helping  
3 someone, you're not just passively sitting back and  
4 letting them do what they're going to do as independent  
5 actors. So when we use the word "enable," we stand by  
6 that definition as help. And in case there's any doubt  
7 that we're talking about purposeful availment,  
8 purposeful conduct and intent, in Paragraph 1 we use  
9 words "designed to," in Paragraph 11 we use words "for  
10 the purpose of," "so that," and in Paragraph 15, which  
11 is the core charging paragraph of the conspiracy  
12 count --

13 THE COURT: Hold on just a second. I had  
14 underlined "designed to."

15 MS. SEDKY: That's Paragraph 1. Paragraph 11  
16 is the definition of "cable modem hacking."

17 THE COURT: I've got it.

18 MS. SEDKY: "For the purposes of," modified  
19 "so that." Paragraph 15, which is our core charging  
20 paragraph, "knowingly conspired, devised a scheme for  
21 the purpose of." Very intentional language that tracks  
22 the statute. Paragraph 25, more definitions, "designed  
23 to." Paragraph 26, "knew that."

24 Our indictment very plainly alleges that he -- and  
25 we plan on proving that Mr. Harris intended to agree

1 with his inner-sanctum insiders and with others known  
2 and unknown to the grand jury and that he intended to  
3 help them steal free and faster internet service.

4 And I think I got sidetracked because you were  
5 asking me a question about **Direct Sales**.

6 Oh, so do we believe that we are obligated to  
7 prove a plus factor here? Not necessarily, because we  
8 actually believe -- although we plan on offering plus  
9 factors, but we will object to instructions that require  
10 us to prove plus factors. We have plenty of plus  
11 factors.

12 THE COURT: You say you will?

13 MS. SEDKY: We will object. We actually  
14 believe --

15 THE COURT: You say you will object?

16 MS. SEDKY: We will object. We believe that  
17 if you have a product that is inherently susceptible to  
18 illegal use, that in certain circumstances providing  
19 that product is enough for a jury to draw the inference  
20 that the supplier knew and intended for its illegal use.

21 Now, we can prove, and our proposed instruction  
22 says that there are many factors that a jury can use to  
23 -- from which to infer the requisite intent, and we list  
24 about five factors, all of which we intend to prove at  
25 trial, the first one being the inherent susceptibility

1 of use, but we're not limiting ourselves in saying that  
2 that would not be enough alone. We have his own  
3 personal use, which the courts have held is relevant to  
4 inferring intent if the supplier himself engages in the  
5 same criminal conduct that's at issue with the product  
6 that he's supplying, that is a factor. The market  
7 conditions of the --

8 THE COURT: What case is that?

9 MS. SEDKY: It's in the trial brief.

10 THE COURT: All right. I'll find it.

11 MS. SEDKY: We briefed it mostly in our  
12 opposition to the motion to dismiss and I'm happy to --  
13 I don't have that one in front of me, actually.

14 THE COURT: Well, that's okay. That's okay.  
15 But this is what I intended, and what didn't occur  
16 because my order wasn't complied with, I intended that  
17 you would really specify these things.

18 MS. SEDKY: We did in the jury instructions.

19 THE COURT: I know, but also in your memo.  
20 This is what I had in mind in December.

21 MS. SEDKY: I apologize.

22 THE COURT: The U.S. Attorney's Office is  
23 capable of doing it. They did it for me in **DiMasi**, the  
24 defendants did it, but you haven't done it here. But  
25 we'll --

1 MS. SEDKY: Every footnote in the jury  
2 instruction for our -- our Instruction Number 2 is our  
3 customized conspiracy instruction and I pulled out every  
4 case cite for every factor that we have listed among the  
5 factors that we would like the Court to instruct the  
6 jury to consider without instructing them that any  
7 single factor is not enough. And so it goes to things  
8 like the market conditions, the financial incentive that  
9 the supplier has. Um, his personal use. His attempts  
10 to hide. And courts, post **Direct Sales** and **Falcone**,  
11 have come up with a list of factors that they -- these  
12 are all sufficiency-of-the-evidence challenges usually,  
13 and so it's a miss-mash. They look at the facts and  
14 they say, "Well, here they have this, this, and this,  
15 and that was enough," or "Here they have that and it  
16 wasn't enough," and so we've culled those together.

17 THE COURT: All right. This is getting me in  
18 the right direction.

19 All right. Then as I noted, I think, in this  
20 case, um, it's going to be necessary and appropriate for  
21 me to give an instruction that distinguishes between a  
22 mere buyer/seller relationship and a conspiracy. And I  
23 noted one case that discussed that.

24 Does the government have a -- you know, what's the  
25 government's view on whether I should give such an

1 instruction?

2 MS. SEDKY: We believe that our proposed  
3 instruction contains the appropriate language that  
4 essentially says that, um, at the bottom --

5 THE COURT: Which instruction?

6 MS. SEDKY: I'm sorry. It's proposed  
7 Instruction Number 2. And what we tried to do was  
8 essentially take **Direct Sales** as a starting point, um,  
9 look at the different factors --

10 THE COURT: And, actually, hold on a second.

11 (Pause.)

12 THE COURT: I'm looking at your Number 2.

13 MS. SEDKY: The government's proposed  
14 Instruction Number 2, it says "Conspiracy involving a  
15 supplier of products or services."

16 THE COURT: Right. Actually the last sentence  
17 says: "But you cannot find that the defendant intended  
18 to join a conspiracy based solely on his knowledge of  
19 the illegal use of his products." That's what I thought  
20 you were telling me when we were discussing **Direct Sales**  
21 you were going to object to.

22 (Pause.)

23 MS. SEDKY: I think that gets drawn on what  
24 inferences you draw about the product itself. So if it  
25 were a benign product, I think you could -- my

1 understanding of **Direct Sales** is there's a continuing --

2 THE COURT: No, no, no, but -- here. To some  
3 extent I'm relying on what you've given me. If you tell  
4 me --

5 MS. SEDKY: I think that in the benign  
6 screwdriver context, and we've talked about hammers  
7 before --

8 THE COURT: But this isn't a benign  
9 screwdriver case, this is your case-specific --

10 MS. SEDKY: No, I understand. We were trying  
11 to accommodate a concern that we thought the defendant  
12 would have, that's why we threw that in there.  
13 Personally I didn't want to put it in and Mr. Bookbinder  
14 agreed that it's fair to the defendant.

15 THE COURT: Here, fine. We can do it legally  
16 correct. But this isn't Mr. Bookbinder or Ms. Sedky  
17 versus Mr. Harris, this is United States of America and  
18 you submitted this and you need to be -- the  
19 government -- it's not that your positions can't evolve,  
20 although at some point if I relied on them, if the  
21 defendants relied on them in the theory of the case, I'm  
22 not going to change it at the end. That's something  
23 that happened in **DiMasi**, but --

24 MS. SEDKY: Okay. At this point we would  
25 probably delete the last sentence because we don't think

1 it's applicable to the facts here where you have a  
2 product that we believe that we will prove is inherently  
3 suspicious.

4 THE COURT: This is identifying things I need  
5 to work on.

6 All right. So how have you addressed here the  
7 fact that a mere buyer/seller relationship is not  
8 sufficient?

9 MS. SEDKY: Well, we say in certain  
10 circumstances, so it's not in all circumstance, in  
11 certain circumstances a supplier of products to known  
12 illegal users can become a party to a conspiracy.

13 So the first sentence we intended to tee up the  
14 notion that -- you know, to debunk the idea that any  
15 time a supplier sells something to users who then use it  
16 illegally become party to the conspiracy. And then we  
17 list what you have to do to fit within those  
18 circumstances, namely in order to find them guilty you  
19 have to show that they shared the intent essentially to  
20 effectuate the criminal purpose.

21 So the first paragraph, we believe, articulates  
22 the legal standard -- I'm not sure the defendant  
23 actually disagrees with that proposition. And then what  
24 we did was we gave the types of evidence that jurors  
25 could use to infer that we have met that legal

1 standard. That's the purpose of the second paragraph.

2 THE COURT: Well, I'll look at it. But **Gee** is  
3 a Seventh Circuit decision in what seems to be an  
4 analogous case, some box used to steal cable service.

5 MS. SEDKY: Well, **Gee** -- yeah, I'd actually  
6 like to address it if the Court wouldn't mind.

7 THE COURT: Go ahead.

8 MS. SEDKY: There were a series of descrambler  
9 cases that were out back when descramblers and cable and  
10 satellite TV were big and the technology's actually  
11 different functionally quite significantly. In some of  
12 the cases, some of the descramblers, they essentially  
13 allow the user to just hide and be invisible. So  
14 there's no misrepresentation involved.

15 So in the wake of, um, **Neder**, that imposed a  
16 materiality standard on the wire fraud statute, some  
17 courts have backed away from some of the descrambler  
18 cases depending on which of the two technologies was  
19 involved, whether it was cable or satellite.

20 So I think it's **Coyle**, C-O-Y-L-E, which we cited  
21 in our opposition to the motion, that was the technology  
22 --

23 THE COURT: Your opposition motion to what?

24 MS. SEDKY: To the motion to dismiss. We were  
25 on a bunch of these descrambler cases and -- and, I'm



1       sorry, I've read a lot of cases and, um, I believe it's  
2       **Coyle**, it's a Fourth Circuit case, and that is the one  
3       -- it teases out the technology and says in that case,  
4       very analogous to Mr. Harris's products, that  
5       descrambler essentially allows the user to take a file  
6       from another user and masquerade as the legitimate  
7       subscriber. And that case is still standing. No one  
8       has been challenging that technology.

9               Now, some of it -- and I can't remember whether  
10       it's cable or satellite, but the silent-mode cases --

11              THE COURT: Ms. Sedky, you're beginning to  
12       sound like the boy who knew how to spell banana, but  
13       didn't know when to stop.

14              MS. SEDKY: Okay. Thank you, your Honor.

15              THE COURT: You're very technical and I'm  
16       confident that the Seventh Circuit case was after **Neder**,  
17       which required materiality. I'm not quite sure what one  
18       has got to do with the other one.

19              MS. SEDKY: We believe that the technology is  
20       different and materially different.

21              THE COURT: But I think -- well, that's  
22       what -- so you think -- well, let's see.

23              (Pause.)

24              THE COURT: Let me put it this way. Just  
25       glancing at your Proposed Instruction 2, I doubt that it

1 is adequate to distinguish buyer/seller in the context  
2 of this case where the interdependence of the buyers is  
3 going to be important and I'll give you --

4 MS. SEDKY: We could certainly outline --

5 THE COURT: Fine. I'm going to give you until  
6 the 14th to supplement your jury instructions on this at  
7 least and in any other way that emerges from the  
8 discussion we're having. Both of you.

9 But does the defendant agree that there should be  
10 a buyer/seller instruction?

11 MR. MCGINTY: Oh, absolutely.

12 THE COURT: And did you give me one?

13 MR. MCGINTY: I did and it's in the  
14 instructions that we've submitted.

15 THE COURT: And I think that's --

16 MR. MCGINTY: And we wouldn't object to  
17 exactly what the Court is suggesting that we add here.

18 THE COURT: Well, I didn't suggest anything  
19 specific.

20 But, I mean, you know, these are getting at, I  
21 think, important nuances. You know, even you and  
22 Mr. Bookbinder apparently -- aren't in complete  
23 agreement. The United States is going to have to state  
24 its position and then I'm going to decide. I think you  
25 have two goals, one is to get a conviction and the other

1 is to have it affirmed on appeal.

2 Okay. All right. I thought that **Loder**, 23 F.3d  
3 586, 590 at 591, was a helpful decision on aiding and  
4 abetting. This goes to the mail fraud theory. Um, it  
5 provides that, among other things, to aid and abet the  
6 defendant here, Mr. Harris, um, would have to share the  
7 specific intent to defraud of the principal. The  
8 government will have to prove the defendant knew he was  
9 furthering wire fraud and would not have to be shown to  
10 have known all the details, but a general suspicion  
11 would not be enough. That's sort of the black letter  
12 law.

13 And it leaves me with a question of whether --  
14 that I've raised before, whether you can aid and abet a  
15 crime either by a person that you don't know by name or  
16 pseudonym, um, and I don't know what -- I didn't get a  
17 sense from the government's trial brief that, except  
18 perhaps with regard to Mr. Hanshaw, there's going to be  
19 any evidence from which a jury could infer that  
20 Mr. Harris knew that the other three named  
21 co-conspirators from Massachusetts were committing wire  
22 fraud.

23 MS. SEDKY: Thank you, your Honor.

24 We believe that he had very extensive  
25 communications with Mr. Hanshaw directly and also one of

1 the three users was a reseller. And we will prove at  
2 trial that he bought thousands of dollars worth of  
3 products, many, many, many different iterations over the  
4 span of an entire year, from Mr. Harris.

5 THE COURT: Which one is that?

6 MS. SEDKY: I can't remember.

7 (Pause.)

8 MS. SEDKY: It's Mr. Larosa.

9 So we have sort of two super users and then we  
10 have two who are admittedly, you know, maybe has one or  
11 two transactions.

12 THE COURT: Well, a super reseller is not  
13 necessarily a super user. It goes back to the --

14 MS. SEDKY: Well, he used it for a year  
15 himself. I don't know how many of those products he  
16 bought and used himself, but he bought hundreds of  
17 products and resold them to others.

18 And so he had a -- but let me just step back and  
19 say that we don't believe that we have to prove direct  
20 communication to establish aiding and abetting and we're  
21 happy to supplement. But I have some case citations  
22 that we've researched and I'd be happy to submit it to  
23 the Court.

24 THE COURT: I don't know what you've been  
25 saving it for.

1 MS. SEDKY: I just got them this weekend in  
2 case it came up and I apologize if --

3 THE COURT: Well, it's come up, it's come up  
4 before. I have a substantial question as to whether  
5 somebody can be convicted based on a theory of aiding  
6 and abetting unless he knows a particular person is  
7 committing a particular crime.

8 MS. SEDKY: Well, and to step back to the  
9 evidentiary piece, the factual piece, Mr. Harris, um, we  
10 will prove at trial was in charge of the customer  
11 records and the customer records show the name and the  
12 physical address and what they brought and when, and he  
13 also, um, was at certain times personally in charge of  
14 shipping. And each time someone bought a device from  
15 him -- and we will prove this through our own undercover  
16 purchase, that Mr. Harris would send out an e-mail to  
17 that person, "Dear," name of purchaser, and it would  
18 have the person's name in there, "Here's your -- here  
19 are some details about your purchase," and then he also  
20 kept track of who his users were. He instituted a  
21 licensing requirement where they would have to get a  
22 license from him. He had a decryption key that they had  
23 to use to unlock. He started decrypting his -- he  
24 thought people were stealing his intellectual property  
25 and copying and stealing from him and so he started

1     locking down his software program. And what he did was  
2     he also had Isabella Lindquist, and we will have her  
3     testify, that she coded, at his instruction, a feature  
4     into each modem that would have it phone home, phone to  
5     the TCNISO website, to ping the TCNISO website so he  
6     would know the IP address of all of his users at a  
7     time.

8             So there were -- you know, there were electronic  
9     communications back and forth in the ways of e-mails and  
10    product ordering and we will also brief the legal issue  
11    of whether and how much proof an aider and abetter needs  
12    to have.

13            THE COURT: Well, if you've got some cases,  
14    I'm ordering that you provide them to us by 3:00 this  
15    afternoon.

16            MS. SEDKY: We will do so.

17            THE COURT: Give them to me and to Mr. McGinty  
18    and then we'll see what's going to be briefed. But this  
19    --

20            And, Mr. McGinty, what would you like to say about  
21    the aiding and abetting, particularly whether you have  
22    to, as a general matter, prove the evidence, you know,  
23    to know the particular person is committing a particular  
24    crime?

25            MR. MCGINTY: Well, the government's argument

1 is largely that product capability dictates culpability  
2 and what their argument is is that in the sale of the  
3 item to the customer, the aiding and abetting is  
4 established by virtue of that product capability. Um,  
5 so they want an instruction that says "capability equals  
6 culpability," they want that both for principal  
7 liability, they want it for conspiracy, but they also  
8 want it for aiding and abetting, and that's a  
9 proposition that the cases don't support.

10 And just to back up a second. Their proposed  
11 instruction is that in certain circumstances -- and the  
12 point of a jury instruction is to identify the  
13 significance of those circumstances, but in certain  
14 circumstances a seller can be culpable for the conduct  
15 of a product purchaser, and what they haven't done is  
16 identified what modicum of sufficiency is necessary for  
17 a jury to find that.

18 Now, one of the things we've tried to do is to say  
19 that the Court has to make preliminary rulings sort of  
20 baseline on what is and is not unlawful and in  
21 connection with the sale of modems. The government says  
22 that trading MACs is unlawful and that it's part of  
23 culpable conduct for the purposes of the jury's  
24 consideration of guilt. They haven't supplied any  
25 support for the claim that MACs are confidential and the

1 trading of them is --

2 THE COURT: My present reaction to that is  
3 that this is hardly a final answer, this is, you know,  
4 what I want to test and I expect will evolve, that the  
5 answer to that is, um, whether it was done with intent  
6 to defraud. In other words, you know, if somebody  
7 collected MAC addresses the way kids used to collect  
8 baseball cards, you got a MAC address and you just put  
9 them up on your wall and looked at them rapturously,  
10 that, you know, wouldn't be illegal. If you're trading  
11 MAC addresses to get something of value by virtue of a  
12 misrepresentation and you use a wire in furtherance of  
13 that scheme, you know, then getting the MAC addresses is  
14 part of a scheme to defraud.

15 MR. MCGINTY: Well, can I sort of peel that  
16 apart because I think the charges here do this. The  
17 government has presented the scheme in two different  
18 ways in substantive counts, they charge the scheme in  
19 the sale of the product and they allege that the  
20 communication or the delivery of the items to the person  
21 or the communication about the sale of the items to that  
22 person, um, is integral to the scheme.

23 THE COURT: Well, in furtherance of the  
24 scheme.

25 MR. MCGINTY: In furtherance of that scheme.



1 They allege separately that each customer, in his use of  
2 the item, is, um, violating the wire fraud statute, the  
3 wire fraud, um, the wire component being the access to  
4 the internet occasioned by the use of the product.

5 So they've alleged in their substantive counts  
6 two different schemes.

7 THE COURT: No. Let me put it this way. Let  
8 me tell you how I understand it and then they can  
9 address it.

10 MS. SEDKY: We agree with you, your Honor.  
11 No, I'm just kidding.

12 THE COURT: They've alleged a scheme and then  
13 they've alleged certain wire communications in  
14 furtherance of the scheme. I so far interpret it as an  
15 overarching scheme and that, in *DiMasi*, when I  
16 instructed on furtherance, and this is in the  
17 instructions I gave you previously. Just a second.

18 (Pause.)

19 THE COURT: I instructed that: "The mailing,"  
20 in that case, "does not have to be essential to the  
21 scheme or be itself fraudulent, however it must be made  
22 as part of an attempt to execute or accomplish the  
23 scheme." So if there were an overriding scheme to, you  
24 know, deprive ISPs of money or property by  
25 misrepresenting their MAC addresses, that, in my current

1 conception, would be the scheme. Let's see if the  
2 government agrees. And then some of the wires, as I  
3 understand it, um, were wires ordering devices from  
4 Mr. Harris and that could be part of the scheme because  
5 you need the device to execute the scheme, and the goal  
6 of the scheme was to get internet service without paying  
7 for it, either for free or not paying the premium price,  
8 so those wires would be in furtherance of the effort to  
9 accomplish the scheme. That's how I think about it at  
10 the moment.

11 Is that -- hold on just a second. Is that the  
12 government's theory?

13 MS. SEDKY: Yes, it is, your Honor.

14 THE COURT: Okay. Go ahead.

15 MR. MCGINTY: You know, what's important here  
16 is the government is saying that they are of the view  
17 that the capability, the inherent, um, capability of  
18 this to steal service is a sufficient predicate for  
19 culpability. So the fraud, the wire fraud here is in  
20 the sale of the item. But that's --

21 THE COURT: And --

22 MR. MCGINTY: If they an instruction, and I  
23 think they can support an instruction, that capability  
24 supports a conviction, aiding and abetting or principal  
25 liability or conspiracy, that product capability

1 supports that, then their conspiracy is complete upon  
2 the delivery. Whether there's a secondary use of the  
3 product or not is not --

4 THE COURT: Well, it could be. No, it could  
5 be. I told you about **Potter**. Remember you can have a  
6 scheme that -- in a mailing or a wiring, that in  
7 furtherance of the scheme, that doesn't actually get any  
8 money or property. It could be aborted before it got to  
9 that point.

10 I -- you know, I'm trying to do what I do in every  
11 case, one, listen to you, but, two, I don't want -- I  
12 would prefer we not get to the final jury instructions  
13 and you say, "Judge, why are you going to instruct that  
14 way? We've pegged our whole defense to the assumption  
15 you're going to instruct some other way."

16 And I'll consider **Direct Sales**. First of all, the  
17 government will have to decide which of the prosecutors  
18 speaks for the government on this, but -- you know, I'll  
19 give what I consider to be an accurate, balanced-type  
20 description of the law.

21 But I think -- I had understood both the law  
22 generally and the government's theory particularly  
23 differently than you described it today, which is how  
24 you described it to me before, but as I've studied this  
25 over the last couple of days, I got to the point that I

1 just explained to you. So you want to think about it.  
2 And it's not the last time we're going to discuss it,  
3 but you may want to consider what I just said to you.

4 As I told you -- and I am, you know, limiting the  
5 time that I can devote to this today. I think the  
6 defendant's reliance on 47 United States Code, Section  
7 230, is misplaced. There may be no liability for  
8 defamation, um, to Mr. Harris for hosting a website, if  
9 somebody does something that was defamatory. It's state  
10 law. But it doesn't -- you know, the First Amendment  
11 precludes, you know, statements on the website -- well,  
12 you know, conspiracies often, although not always,  
13 involve some statements and the First Amendment doesn't  
14 protect them. But if it's a statement that expresses an  
15 intention to agree on an intention to commit a crime,  
16 it's not protected by the First Amendment or this  
17 statute, is my current conception.

18 MR. MCGINTY: Well, your Honor, if I might  
19 just recite the words of the statute.

20 THE COURT: Hold on a second. Let me get it.

21 MR. MCGINTY: This is 47 U.S.C., Section 230.

22 THE COURT: Just one second. Go ahead.

23 MR. MCGINTY: "No provider" --

24 THE COURT: I'm sorry. Which section?

25 MR. MCGINTY: This is C(1), Section 230. So

1     it's "Treatment of Publisher or Speaker. No provider or  
2     user of an interactive computer service shall be treated  
3     as the publisher or speaker of any information provided  
4     by another information-content provider." And what this  
5     provides is that a provider of interactive computer  
6     service, which would be here for him, is not treated as  
7     the publisher or speaker, um, of content that is posted  
8     by another person. And here what we have are -- and we  
9     haven't really gotten to the co-conspirator part of this  
10    and the claim that --

11           THE COURT: That's where this is going.

12           MR. MCGINTY: -- that these forums are somehow  
13    admissible. You've got the potential for someone to  
14    post on the forum their own ideas about what they can do  
15    with the modem, and if they say on there, "Is there  
16    someone who could get me a MAC address," is Harris on  
17    notice that he's responsible for that content?

18           THE COURT: Well, let me put the question to  
19    you. Is it your contention that this section trumps  
20    Rule of Evidence 801(d)(2)(E)?

21           MR. MCGINTY: The trump is -- in order for it  
22    to be a statement of a co-conspirator, there are a  
23    number of requirements for it. The person has to be  
24    identified. Here they're not.

25           THE COURT: No, I understand all of that, but

1 please answer my question.

2 MR. MCGINTY: I will. The answer is "yes,"  
3 and why? 801(d)(2)(E) is a -- is based on a theory of  
4 adoptive admission, the theory of the rule is that it is  
5 consequential --

6 THE COURT: No, it's based on a theory of  
7 agency.

8 MR. MCGINTY: I'm sorry. Of agency. I  
9 misspoke. But it's the idea that a person who is part  
10 of your conspiracy that you, in effect, permitted them  
11 as speaker on your behalf, um, what this statute does is  
12 it reflects an enactment by the Congress saying that  
13 there is no such agency, the party that runs the forum  
14 is not responsible for the content. And there are  
15 considerations that cause Congress to express this.  
16 Among them is the First Amendment right of the speaker.  
17 Among them are liability issues. But there's a flat  
18 statement here that makes that third-party statement of  
19 some other person not your statement in terms of, um --

20 THE COURT: Well, that's the first time I've  
21 understood you to be making that argument, or perhaps I  
22 misunderstood you, but I didn't have all that much time  
23 to understand you, and then that's one we should brief  
24 further, too.

25 What's the government's position on it?

1 MR. BOOKBINDER: Your Honor, essentially we --  
2 first of all, our core position is that this statute  
3 talks about civil liability --

4 THE COURT: Well, actually where does it talk  
5 about civil liability? I read about that in the  
6 **Universal** case, but I didn't.

7 MR. BOOKBINDER: Well, your Honor, it may not  
8 be so much that it -- well, I don't have the section in  
9 front of me, I'm afraid. That's -- it had something to  
10 do with the rules of evidence and, um, I don't think  
11 there's anything in there that addresses certainly the  
12 use of statements in criminal cases. But Mr. McGinty  
13 might be right in one sense which is the sense that if  
14 the only evidence you had linking someone -- linking  
15 people together, linking let's say a speaker with the  
16 person who publishes the website, was that this person  
17 had made a post on someone else's website, um, what the  
18 statute seems to say is that the publisher -- the person  
19 who sets up the website is not considered responsible  
20 for that post, for example, and therefore might not be  
21 responsible for the content.

22 In this case we've got people, at least the ones  
23 we're seeking to offer as co-conspirator statements,  
24 there are other links between them, they are customers  
25 of Mr. Harris's, meaning they've either bought a product

1 or they've paid a membership fee to be a member of his  
2 forums. And so we're not relying on the fact that they  
3 may have post as the link between them that establishes  
4 this kind of a connection. And so therefore I think  
5 that kind of addresses the concern of the statute.

6 THE COURT: Well, these are interesting  
7 issues.

8 All right. I'm going to have to stop momentarily  
9 and we haven't actually gotten to the motions in  
10 limine.

11 I'll tell you what some of my main questions are.  
12 And I think when we resume tomorrow morning, which we'll  
13 do at 10:00, um, the defendant's -- well, let me ask you  
14 this question, because I haven't finished going through  
15 the motions in limine the way I want to.

16 Do the defendants raise any points -- does the  
17 defendant raise any points in his motions in limine that  
18 are not raised and addressed by the defendant as well as  
19 the government with regard to the government's motions  
20 in limine? Are they essentially mirror images?

21 MR. McGINTY: I'm sorry. Is there anything in  
22 my view --

23 THE COURT: Yeah, so far I've read the  
24 government's recently-filed memo in support of its  
25 motions in limine and your response. I haven't yet read



1 the -- your memo. Does it raise some issues that are  
2 not raised in the government's submission?

3 MR. MCGINTY: Um, the particular thing it  
4 raises and it's, um -- I think the government elects not  
5 to answer the question. As I understand the  
6 **Petrozziello** issue, it is, is there a conspiracy? Was  
7 the statement of the -- was the speaker's statement part  
8 of and in furtherance of that conspiracy? The  
9 government --

10 THE COURT: Well, that's not it necessarily,  
11 but you raise a point that requires some focus in this  
12 case. I think, as a general proposition, the  
13 government's right, the statement can come in under Rule  
14 801(d)(2)(E) even if it was not in furtherance of the  
15 conspiracy charged, or any charged, you know, even in a  
16 case that doesn't charge a conspiracy, but it has to be  
17 a conspiracy with Mr. Harris. And if it's not the  
18 conspiracy charged in the indictment, at a minimum,  
19 you're right, I want to know what conspiracy it is and  
20 whether there are Rule 403 considerations that might  
21 operate to exclude it if it's not this charged  
22 conspiracy.

23 MR. MCGINTY: So the difficulty is the  
24 government has said either way we get it in and what I  
25 don't know is either way what, which is the conspiracy

1       that you say that supports your theory?

2               THE COURT: Yeah, I know, you've educated me  
3       to that point. Let me -- well, because of my time  
4       constraints. I have to preside at a meeting with my  
5       colleagues.

6               Here, you've told me who are the alleged  
7       co-conspirators for the purpose of making **Petrozziello**  
8       rulings. **Sepulveda** was the initial First Circuit case  
9       that established what I think is now widely recognized  
10      as the rule that, in fact, Rule 801(d)(2)(E) codifies,  
11      that you need something more than the statements  
12      themselves.

13              The government, in some of these instances, is  
14      relying on Mr. Harris's statements and I think,  
15      depending on what those statements are, that it might  
16      be, in some instances, enough. But I think with regard  
17      to each alleged co-conspirator for these purposes and  
18      each -- and each statement, I want the government to be  
19      able to show me what, or tell me now, what the extrinsic  
20      evidence is going to be. Not today. Tomorrow. What  
21      the plus is going to be. And again, you should look in  
22      my **DiMasi** instructions. And **Richardson**, which is cited  
23      there, 225 F.3d 46 at 53, um, I said: "A defendant's  
24      membership and conspiracy must be proved by evidence of  
25      his own words and actions. In deciding whether a

1 defendant was a member of the conspiracy alleged in this  
2 case, you should consider the direct and circumstantial  
3 evidence of his own acts and statements." That's what  
4 the First Circuit says. "Such evidence may include acts  
5 or statements of other defendants and another  
6 co-conspirator, Lally, only to the extent they are  
7 evidence of the words and actions of the defendants you  
8 are considering."

9 So I had some difficulty -- that's how I  
10 reconciled **Richardson** and **Petrozziello**. In other words,  
11 I don't think you just look at -- I don't think I just  
12 look at what, say, Mr. T said, I look at other evidence  
13 of whether Mr. T was a member of the conspiracy. If  
14 Mr. Harris had said to Mr. Phillips, "I've recruited  
15 Mr. T to be part of our conspiracy, here's what he's  
16 going to do, here's what we're going to pay him," that  
17 would be evidence, in my current conception, that Mr. T  
18 was part of the conspiracy. The defendant can argue  
19 about that, as a general proposition, and he could also  
20 argue about whether the statements of Mr. Harris here,  
21 that the government is relying on say with regard to  
22 Mr. T, are sufficient. I have that question. That  
23 we'll talk about tomorrow.

24 My tentative view is that the defendant does not  
25 have to know a co-conspirator's real name, but the

1 person has to be identifiable in some way by me to make  
2 a **Petrozziello** ruling. So you've identified Mr. T, but  
3 you have what I think are unidentified people on chats  
4 and posts -- and you'll to have to tell me what a chat  
5 is and what a post is tomorrow, but I, at the moment,  
6 you know, have a question -- you know, I have a doubt  
7 that I could admit those statements as co-conspirator  
8 hearsay and I would -- and I also have some skepticism  
9 about whether there's another basis for admitting any of  
10 it, and if there is, whether they should nevertheless be  
11 excluded under Rule 403.

12 I have a question and I'll look at -- I didn't  
13 look at the cases, but I think I'm familiar with the  
14 concept, of how an adoptive admission standard should  
15 operate with regard to chats? In other words, I think  
16 an adoptive admission, as I understand it, is a  
17 statement that a reasonable person would ordinarily, um,  
18 refute if it wasn't true. If somebody said to me, "That  
19 was, you know, great last night when we robbed the bank  
20 and got away with it." If I didn't rob the bank, um, a  
21 reasonable person, I think, would say, "What are you  
22 talking about?"

23 I don't do chats, but, you know, these things are  
24 going back and forth and they go very quickly and they  
25 don't seem to be entirely linear or coherent, you know,

1     they're jumping around and are very cryptic. So would a  
2     reasonable person disagree with something in one of  
3     these chats? I've got a question.

4             And I think I will -- and we'll start tomorrow  
5     with the defendant's opposition to the government's  
6     motion in limine, because it's starts with some -- well,  
7     the opposition is mainly a discussion of the applicable  
8     law, like a verbal act. I do think the government may  
9     have too broad a view of what's a verbal act. You know,  
10    the defendant -- the government says, "Well, we're not  
11    offering this for the truth, we're offering it for  
12    context," but it may not -- I think there's at least one  
13    case that said, you know, it doesn't provide any  
14    meaningful context unless it's true.

15            So I think a lot of this is -- I'm going to end up  
16    -- I'm inclined to analyze it, but closely, under the  
17    co-conspirator hearsay provisions. And it's true, in  
18    many cases, that I can conditionally admit something,  
19    but as I told you previously, I also have the  
20    discretion, if I thought it was appropriate, you know,  
21    to either do voir dires on whether this is going to link  
22    up, but that would be trying the case twice. But it  
23    would require the government to put the linking evidence  
24    first. I'm not inclined to do that at the moment, but I  
25    do want more specificity on how the government's going

1 to prove --

2 I think I directed you to give me today something  
3 in writing on the names of the alleged co-conspirators  
4 for **Petrozziello** purposes? I think I did.

5 MR. BOOKBINDER: Yes, your Honor.

6 THE COURT: You gave me the names. But do  
7 that this afternoon.

8 MR. BOOKBINDER: Yes, your Honor.

9 THE COURT: And you don't have to put this in  
10 writing for today, you can make it a little later, do it  
11 at 3:30 or something, if you want to supplement it.  
12 But, you know, what's going to be the plus, what's going  
13 to meet the requirements of **Borgelay**, Rule 801(d)(2)(E),  
14 **Sepulveda**? Because what I don't want to do is get to  
15 the end of the government's case, you know, find that  
16 I've conditionally admitted evidence as co-conspirator  
17 hearsay that the government has not proven is admissible  
18 and then have to contend with the foreseeable motion for  
19 a mistrial. Mr. Harris will say there's prejudice, that  
20 the jury's not going to forget or disregard what they've  
21 heard.

22 And I would encourage the government to think  
23 about -- think further about the evidence it wants to  
24 offer. In other words, what do some of those chats and  
25 posts really add? You know, what are they relevant to?

1 Because these are also 403 considerations. Do they show  
2 that Mr. Harris knew something? Don't you have a lot of  
3 other evidence that shows he knows it? You may want to  
4 say, you know, "We won't put that in our case in chief,  
5 we'll wait to ask you to put it in rebuttal." And you  
6 want to think about how you're going to respond to a  
7 question about Rule 403. All right?

8 Let me see my calendar.

9 (Pause.)

10 THE COURT: Here, why don't you come in at  
11 10:30 tomorrow and it will give me a little more time to  
12 catch up with you.

13 All right. The Court is in recess.

14 (Adjourned, 12:45 p.m.)

15

16 C E R T I F I C A T E

17

18 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do  
19 hereby certify that the forgoing transcript of the  
20 record is a true and accurate transcription of my  
21 stenographic notes, before Chief Judge Mark L. Wolf, on  
22 Tuesday, February 7, 2012, to the best of my skill and  
23 ability.

24 /s/ Richard H. Romanow 11-06-12

25 RICHARD H. ROMANOW Date